

ALJ/RL8/jt2

PROPOSED DECISION

Agenda ID #14627 (Rev. 2)

Ratesetting

4/21/2013

Decision PROPOSED DECISION OF ALJ LIRAG (Mailed 2/3/2016)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of NobelTel, LLC for Registration as
an Interexchange Carrier Telephone Corporation
pursuant to the provisions of Public Utilities
Code Section 1013.

Application 13-01-014
(Filed January 31, 2013)

**DECISION DENYING NOBELTEL, LLC A CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY IN ORDER TO PROVIDE LIMITED
FACILITIES-BASED INTEREXCHANGE SERVICE**

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**DECISION DENYING NOBELTEL, LLC A CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY IN ORDER TO PROVIDE LIMITED
FACILITIES-BASED INTEREXCHANGE SERVICE**

Summary

This decision denies NobelTel, LLC's (NobelTel) application for a certificate of public convenience and necessity under Public Utilities Code Section 1001,¹ to provide limited facilities-based interexchange service in California. The Commission finds that NobelTel has not demonstrated that it is fit to operate and provide its proposed services in California based on NobelTel's unauthorized operation since April 19, 2012, history of regulatory violation in California and in other states, and questions as to whether NobelTel's prepaid telephone cards and marketing materials contain proper disclosures of its rates, terms and conditions.

This decision also assesses a fine of \$146,500 against NobelTel for 293 days of operating without authority from April 19, 2012 to January 30, 2013. The Commission considered various mitigating circumstances and concluded that the minimum fine prescribed in § 2107 of the Public Utilities Code of \$500 for each day of operating without authority should be applied. The Commission also determined for purposes of assessing the fine that the number of days of NobelTel's unauthorized operation should be tolled from the time it filed for authority to operate on January 31, 2013.

¹ While this application was filed pursuant to Public Utilities Code Section 1013, an expedited and ministerial registration process, the protest filed by the Safety and Enforcement Division and resulting assignment to an Administrative Law Judge removed it from the registration track. It has therefore been evaluated as a certificate of public convenience and necessity under § 1001.

1. Background

On January 31, 2013, NobelTel, LLC (NobelTel or applicant), a limited liability corporation in California, filed an application for a certificate of public convenience and necessity (CPCN) to provide limited facilities-based interexchange service in California.

NobelTel provides wholesale origination and termination services to other carriers. NobelTel also provides prepaid international telecommunications services to customers, and through an affiliate company, post-paid international dial-around services. NobelTel's principal place of business is located at 5973 Avenida Encinas, Suite 202, Carlsbad, California 92008.

NobelTel had prior Commission authorization to provide inter- and intra-local access and transport area services in California as a non-dominant interexchange carrier (NDIEC).² Said operating authority, however, was revoked by the Commission on April 19, 2012,³ due to NobelTel's failure to remit to the Commission surcharges for public purpose programs pursuant to D.96-10-066.⁴ In D.09-10-066, the Commission established rules which provide that state universal service programs are to be funded through a surcharge on revenues earned from intrastate telecommunications services.⁵

On March 7, 2013, the Safety and Enforcement Division (SED) filed a protest to NobelTel's application. The protest stated that NobelTel continued to operate in California even after its authority had been revoked by the

² See Decision (D.) 02-11-042 issued on November 8, 2002.

³ See Resolution T-17359.

⁴ *Id.* at 1.

⁵ *Id.* at .

Commission on April 19, 2012. SED also questioned NobelTel's fitness to operate citing nine instances where NobelTel failed to comply with regulatory requirements. SED also alleged that NobelTel may be engaged in deceptive practices that result in harm to consumers, charging undisclosed fees and surcharges to its customers, and providing less than the full number of minutes advertised in its prepaid telephone cards.

On April 2, 2013, NobelTel filed a Reply and explained that while it did continue to operate in California after its authority had been revoked on April 19, 2012, it did so at a de minimis level. NobelTel claims that although its telephone cards may be used to place calls in California, the telephone cards are marketed for international calls and most of the calls that were actually made were international calls.⁶ NobelTel also denied it is are engaged in deceptive practices that cause harm to consumers.

A prehearing conference (PHC) was held on May 29, 2013. On August 12, 2013, the assigned Commissioner issued a scoping memorandum setting forth the issues and schedule of the proceeding. An evidentiary hearing was held on November 14, 2013. Parties filed opening briefs on December 5, 2013 and reply briefs on December 19, 2013.

On March 14, 2014, the assigned Administrative Law Judge (ALJ) issued an e-mail ruling directing applicant to supplement the record with additional information which the applicant filed on March 25, 2014. On March 18, 2014,

⁶ See Reply at 4. NobelTel states that from April 19, 2012 to the filing of the application, intrastate usage of its telephone cards accounted for 0.08% of overall revenue from telecommunications services.

SED filed a motion to strike portions of the supplement to which applicant filed a response on March 25, 2014.

On November 21, 2014, the Commission issued a notice of re-assignment of the application, from ALJ Richard Clark to ALJ Rafael L. Lirag.

On January 29, 2015, the assigned Commissioner issued an amendment to the August 12, 2013 scoping memorandum, revising the schedule for the proceeding.

On October 28, 2015, SED filed a motion for official notice of a forfeiture order, issued on October 21, 2015 by the Federal Communications Commission (FCC), imposing a \$5 million penalty against NobelTel for violation of Section 201(b) of the Communication Act of 1934. NobelTel filed a response on October 30, 2015, opposing the motion. On November 19, 2015, the assigned ALJ issued a ruling denying SED's motion to strike supplemental information filed by NobelTel, and granted SED's motion for official notice of the FCC's forfeiture order against NobelTel.

The application was submitted on October 30, 2015.

2. Jurisdiction

Public Utilities Code Section 216(a) defines the term "Public utility" to include a "telephone corporation," which in turn is defined in Public Utilities Code Section 234(a) as "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state." Additionally, pursuant to Pub. Util. Code §§ 885 and 886, providers of prepaid telephone cards doing business in California are subject to the registration requirements of § 1013.

NobelTel provides wholesale origination and termination services to other carriers. NobelTel also provides prepaid international telecommunications

services to customers, and through an affiliate company, post-paid international dial-around services. NobelTel, therefore, is a telephone company and a public utility subject to our jurisdiction.

3. Fitness to Operate

As an applicant for a CPCN, NobelTel has the burden of showing that it has the requisite fitness to operate its business, and provide the services it is seeking authorization for. Thus, NobelTel must show that it meets the financial requirements as well as the managerial and technical expertise in telecommunications or a related business. It must also submit a complete application.

3.1. Regulatory Violations

In its application, NobelTel disclosed the following information in Items 8⁷ and 9⁸ of the application concerning previous violations:

⁷ Item 8 of the application requests applicant to certify to the following: Neither applicant, any of its affiliates, officers, directors partners, agents, or owners (directly or indirectly) of more than 10% of applicant, or anyone acting in a management capacity for applicant: (a) held one of these positions with a company that filed for bankruptcy; (b) been personally found liable, or held one of these positions with a company that has been found liable, for fraud, dishonesty, failure to disclose, or misrepresentations to consumers or others; (c) been convicted of a felony; (d) been (to his/her knowledge) the subject of a criminal referral by judge or public agency; (e) had a telecommunications license or operating authority denied, suspended, revoked, or limited in any jurisdiction; (f) personally entered into a settlement, or held one of these positions with a company that has entered into settlement of criminal or civil claims involving violations of sections 17000 et seq., 17200 et seq., or 17500 et seq. of the California Business & Professions Code, or of any other statute, regulation, or decisional law relating to fraud, dishonesty, failure to disclose, or misrepresentations to consumers or others; (g) been found to have violated any statute, law, or rule pertaining to public utilities or other regulated industries; or (h) entered into any settlement agreements or made any voluntary payments or agreed to any other type of monetary forfeitures in resolution of any action by any regulatory body, agency, or attorney general.

⁸ Item 9 of the application requests applicant to certify to the following: To the best of applicant's knowledge, neither applicant, any affiliate, officer, director, partner, nor owner of

Footnote continued on next page

In August 2009, a class action lawsuit was filed against NobelTel in the United States District Court...The plaintiff alleged violations of California Business and Professions Code § 17500 et seq., § 17538.9 et seq., and § 17200 et seq. The case was dismissed from federal court for lack of subject matter jurisdiction, and in April 2010, plaintiff and others filed a substantially similar action in California court. After lengthy discussion the parties agreed to settle the matter...

On November 3, 2011, the Illinois Attorney General, on behalf of the People of the State of Illinois, filed an action against NobelTel, LLC...The complaint alleged that NobelTel had committed unfair or deceptive acts or practices under section 2 of the Illinois Consumer Fraud Act. The complaint further alleged that in marketing prepaid calling cards to consumers NobelTel had made misrepresentations and had failed to disclose surcharges and fees. After lengthy discussions with the Illinois Attorney General, the parties agreed to settle the matter.

On September 28, 2012 the Federal Communications Commission (FCC) issued a notice of apparent liability (NAL) against NobelTel. The basis for the FCC's claims against NobelTel are the company's marketing practices for prepaid calling cards. This matter is ongoing...

In September 2007, the Public Service Commission of Nebraska revoked NobelTel's certification in Nebraska because NobelTel failed to file its annual report. NobelTel has since resolved this matter and its license has been reinstated.

On April 19, 2012, the CPUC...revoked the licenses of numerous telecommunications carriers, including the Applicant, for failing to comply with the CPUC's reporting requirements...The CPUC found NobelTel had failed to comply with its reporting and remittance

more than 10% of applicant, of any person acting in such capacity whether or not formally appointed, is being or has been investigated by the Federal Communications Commission or any law enforcement or regulatory agency for failure to comply with any law, rule or order.

requirements. NobelTel acknowledges this non-compliance, has taken steps to file the missing returns and pay the missing remittances, and with this application seeks to resume operations within the State of California.

On November 29, 2010, NobelTel received a letter of inquiry from the Enforcement Bureau of the FCC regarding NobelTel's acquisition of another licensed telecommunications provider...After discussions NobelTel and the FCC entered into a consent decree on October 13, 2011.

NobelTel and its ultimate parent company, Nobel Holding, Inc., incurred a Commission fine in March 2010 for failing to comply with California Public Utilities Code Section 854.

In February, 2009, NobelTel incurred a penalty with the FCC for failing to submit an annual customer proprietary network information compliance certificate.

The Washington Utilities and Transportation Commission fined NobelTel in July 2009 for failing to file its annual report on time.

The Florida Public Service Commission fined NobelTel in August 2008 for not filing and paying its Regulatory Assessment Fee.

The Nebraska Telecommunications Infrastructure and Public Safety has filed a number of complaints against NobelTel to collect fines for NobelTel's failure to file required quarterly remittance worksheets and payments. In each case the parties resolved the allegations and NobelTel paid a fine.

3.2. Other Violations

In its investigation, SED identified other violations which NobelTel failed to disclose in its application:

In August 2013, the Connecticut Public Utilities Regulatory Authority revoked NobelTel's authorization due to a failure to make

certain compliance filings. NobelTel had held authorization to provide intrastate telecommunication services in Connecticut since 2003.⁹

On December 19, 2012, the Public Utilities Commission of Ohio (Ohio Commission) found that NobelTel failed to comply with the requirement to pay its assessment for 2012 as prescribed and was granted until December 31, 2012, to show cause as to why its certificate or operating authority should not be revoked for failure to pay the assessed amount.¹⁰

On May 19, 2011, the Ohio Commission identified NobelTel as one of the carriers that failed to file “requisite data” and directed NobelTel to submit its filings.¹¹

On January 11, 2011, the Wyoming Public Service Commission (WPSC) issued an Order Cancelling Registration Authority based on NobelTel’s failure to file its assessment report.¹²

On November 5, 2010, the WPSC issued an order to NobelTel to appear at a public hearing to show cause why its CPCN should not be revoked and cancelled based on NobelTel’s failure to meet the reporting requirements relating to the uniform assessment of public utilities.¹³

On February 12, 2009, the WPSC issued an order to NobelTel to show cause why its CPCN should not be revoked and cancelled based on NobelTel’s failure to file the oath and verification page to its annual report.¹⁴

⁹ Hearing Transcript at 20-21.

¹⁰ 2012 Ohio PUC Lexis 866.

¹¹ 2011 Ohio PUC Lexis 609.

¹² 2011 Wyoming PUC Lexis 65.

¹³ 2010 Wyoming PUC Lexis 393.

¹⁴ 2009 Wyoming PUC Lexis 79.

On December 15, 2008, the WPSC issued an order to NobelTel to show cause why its CPCN should not be revoked and cancelled based on the Company's failure to file the oath and verification page to its annual report.¹⁵

NobelTel explains that the above actions in Connecticut, Ohio and Wyoming were omitted from disclosure due to oversight and that these actions are similar in nature to those that were already disclosed.

When submitting an application, an applicant is expected to conduct the proper diligence in ascertaining that the application is true and complete. While the Commission believes that NobelTel ought to have discovered and disclosed the violations mentioned above with a little diligence on its part, the omission amounts to negligence on NobelTel's part as opposed to willful non-disclosure of material information in its application.

The violations that NobelTel failed to disclose occurred several years ago and are similar in nature to violations in other states that it had already disclosed involving failure to submit regulatory reports. In addition, the violations above originated from single omissions to submit required reports in Connecticut, Ohio and Wyoming, which gave rise to other actions in those states. NobelTel has also shown that it is not averse to disclosing known violations having amended its application to disclose additional violations that it discovered or was made aware of.

However, the actual violations NobelTel failed to disclose, in addition to those that NobelTel disclosed in its application shows that NobelTel has a history

¹⁵ 2008 Wyoming PUC Lexis 524.

of failure to comply with regulatory requirements such as payment of fees and surcharges, and filing of annual reports.

3.3. Operating Without Authority

From the time when its operating authority was revoked by this Commission on April 19, 2012, NobelTel continues to operate without Commission authority.

NobelTel does not contest it is operating without Commission authority but argues that it provides a de minimis amount of service in California. NobelTel claims that its prepaid calling cards are marketed for international calls and while the same calling cards may be used to make local calls in California, around 99% of calls are international in nature. NobelTel also points out that it had paid to the Commission its unpaid surcharges, which was the reason for the revocation of its authority to operate in California.

Prepaid phone card providers are subject to the registration requirements of Pub. Util. Code § 1013. There is no exception to the registration requirement simply because NobelTel is a provider of international phone cards and its California intrastate traffic is de minimus. Sections 885-886 require that all phone card providers register with this Commission:

885. (a) Any entity offering the services of telephone prepaid debit cards is subject to the registration requirements of Section 1013, commencing January 1, 1999, unless that entity is certificated by the commission to provide telephone service . . .

886. Entities that are required to register, but have failed to do so, or entities that are denied registration by the commission, shall not offer the services of telephone prepaid debit cards. Entities that are required to register, but have failed to do so, and entities denied registration that offer telephone prepaid debit cards shall be subject to fines or other sanctions that may be ordered by the commission.

These statutes are not limited to phone card providers providing intrastate services, and there is no exclusion for the case where a provider of international phone cards would block access to intrastate calling on cards used in California. Section 886 clearly provides that telecommunications providers that do not register or obtain a CPCN with this Commission, "shall not offer the services of telephone prepaid debit cards" in California

Also, when NobelTel's operating authority was revoked for nonpayment of surcharges for public purpose programs, the subsequent payment thereof does not restore its operating authority. Since April 19, 2012 to the present, NobelTel has been operating without Commission authority. NobelTel's subsequent payment of its unpaid surcharges and marketing of its prepaid cards for international use can be considered as mitigating circumstances, but does not absolve it from operating without authority. In addition, since it has continued to operate, there is a question of whether NobelTel should be assessed and whether it has paid additional surcharges since 2012.

3.4. Issues Concerning Prepaid Calling Cards and Marketing Materials

On September 28, 2012, the FCC issued a Notice of Apparent Liability (NAL) against NobelTel.¹⁶ The NAL alleged that NobelTel's prepaid calling cards did not sufficiently disclose all rates, terms and conditions applicable to the use of prepaid calling cards. Following the above, the FCC issued a forfeiture order against NobelTel on October 21, 2015, imposing a \$5 million penalty for using misleading and deceptive marketing materials to sell its prepaid calling

¹⁶ See Federal Communications Commission, File No.: EB-TCD-12-00000412, adopted on September 28, 2012.

cards in 2011.¹⁷ The FCC explained that NobelTel made deceptive representations regarding the number of minutes buyers of its prepaid calling cards could use to make calls to foreign countries and failed to disclose material information about its rates, charges and practices that would enable consumers to calculate the cost of international and interstate calls. NobelTel's actions constituted a violation of Section 201(b) of the Communications Act of 1934.

NobelTel argues that the NAL is only an allegation and that it can also still file for reconsideration of the forfeiture order. NobelTel also added that two of the five FCC Commissioners dissented against the forfeiture order.

The Commission finds that NobelTel's arguments are without merit. While the Commission does not make its own finding that NobelTel is engaged in misleading and deceptive practices in selling and marketing its prepaid calling cards, before a CPCN can be issued to NobelTel, it must first resolve these issues and clearly demonstrate that it is not engaged in deceptive selling and marketing practices, and that its prepaid calling cards and advertising materials conform with the requirements in Business and Professions Code Section 17538.9. Consumers must be able to reasonably determine the rates and charges applicable when making international, interstate and local calls.

Based on the above, the Commission finds that NobelTel failed to satisfactorily show that it is fit to operate in California and its application should be dismissed without prejudice.

¹⁷ See FCC Forfeiture Order released on October 21, 2015. A copy of the Forfeiture Order is included as Attachment "A" to SED's October 28, 2015 motion.

4. Fine for Unlicensed Operation

As discussed in Section 3 of this decision, NobelTel has operated without Commission authority since the revocation of its authority to operate, on April 19, 2012, up to the present, in violation of § 1001 of the California Public Utilities Code (Code). The violation is considered to be continuous as NobelTel has operated each day after April 19, 2012, without the required Commission authority.

Sections 2107 and 2108 of the Code establish the Commission's authority to impose fines for violations of laws and regulations. Section 2107 prescribes the amount of the fine that may be imposed, which ranges from \$500 to \$50,000 for each offense. Section 2108 of the Code on the other hand clarifies that in case of a continuing violation, each day's continuance thereof shall be treated as a separate and distinct offense.

SED recommends a fine of \$225,000 while NobelTel recommends that either no fine be assessed or, a fine of \$2,000 per year of operating without authority.

In determining the appropriate amount of a fine, the Commission uses the principles established in Decision 98-12-075 wherein the Commission enumerated five factors considered in establishing an appropriate penalty amount.

4.1. Severity of the Offense

The severity of the offense includes considerations about types of harm which can result from a rule violation. The Commission typically evaluates an offense based on the degree of economic or physical harm, or the unlawful

benefits gained by the utility.¹⁸ However, the Commission also considers harm to the regulatory process even though it may not involve actual harm to consumers. The Commission further explains in Decision 98-12-075 that Decision 98-12-075 explained that utility violations of statutes or Commission directives, “regardless of the effects on the public, will be accorded a high level of severity.”¹⁹

In this case, while no complaints or reports of actual harm to consumers were received by the Commission due to NobelTel’s unlicensed operation, the Commission finds that the intentional disregard of statute requiring Commission authority to operate, even though NobelTel was well aware of such requirement, severely harms the public’s confidence in the Commission and the integrity of the regulatory process.

4.2. The Conduct of the Utility Before, During, and After the Offense

This factor recognizes the utility’s conduct before, during, and after the offense. NobelTel’s prior registration had been revoked on April 19, 2012, for failure to pay surcharges for public purpose programs. NobelTel continues to operate without authority to do so. It filed this current application on January 31, 2013, seeking authority to operate in this state. It also paid the unpaid surcharges, which was the cause of the revocation of its authority to operate.

NobelTel however, continues to operate despite knowing that its authority to do so had been revoked. NobelTel argues that its operation in the State is

¹⁸ 84 CPUC2d 155, D.98-12-075 at 54.

¹⁹ *Id.* at 55-56.

de minimis and that its prepaid telephone cards are primarily marketed and used for overseas calls although the telephone cards can also be used to make local calls.

The Commission finds NobelTel's argument to be without merit. Commission authority is required for telephone companies to sell prepaid cards in California. This registration requirement is not relaxed because NobelTel sells prepaid calling cards primarily marketed for international use. The de minimis argument is also invalid because it is presumed that California residents are the primary purchasers of NobelTel's prepaid cards in California. The Commission also notes that it took NobelTel approximately nine months before filing a simplified registration application available to NobelTel under § 1013 of the Public Utilities Code. Also, despite paying its unpaid surcharges up to April 19, 2012, it is unclear whether NobelTel continued to pay surcharges subsequent to that time.

4.3. The Financial Resources of the Company

NobelTel submitted unaudited financial statements showing that it has the minimum capitalization required to sell prepaid calling cards. SED points out that NobelTel sold millions of prepaid cards at \$2 to \$5 each while NobelTel argues that it is not among the largest corporations in the United States and should not be subject to a significant fine.

4.4. The Totality of the Circumstances

In considering the amount of a fine, the determination should be tailored to the unique facts and consider the totality of all the circumstances of each case. Thus, the Commission must consider facts and circumstances that both mitigate and aggravate the offense, evaluating such in view of furthering public interest.

In consideration of NobelTel's filing of this application for authority to operate, the Commission finds that NobelTel's continuing violation of operating without required Commission authority should be tolled from the date this application was filed on January 31, 2013, to the date of this decision.

The Commission also takes into consideration NobelTel's payment of its unpaid surcharges and the absence of any reports to the Commission about any harm suffered by consumers due to NobelTel's unauthorized operation.

4.5. Prior Commission Decisions

NobelTel recommends that the Commission impose either no fine or a fine of \$2,000 a year for each year of operating without authority, citing D.09-01-017²⁰ and D.09-05-032²¹ respectively.

The Commission finds that the prior decisions that NobelTel cites as examples are not applicable in this instance.

In D.09-01-017, the fine being considered by the Commission was for violation of Rule 1.1 of the Rules of Practice and Procedure. And similar to D.09-01-017, the Commission in this case is not assessing a fine against NobelTel for what the Commission deems as inadvertent non-disclosure in its application, of regulatory violations in other states. In D.09-01-017, the Commission found that Skynet Communications, Inc. made an honest mistake and promptly amended its pleadings as soon as it became aware that it generated intrastate revenues. With respect to its unauthorized operation, this is clearly not the case

²⁰ See D.09-01-017 issued on January 29, 2009 approving the registration application of Skynet Communications, Inc.

²¹ See D.09-05-032 issued on May 21, 2009 approving a settlement and issuing a CPCN for 88 Telecom Corporation.

with NobelTel which was aware that it needed Commission authority to operate, having had prior Commission authority before termination of such authority.

In D.09-05-032, the Commission levied a fine against 88 Telecom Corporation (88 Telecom) of \$8,000 for four years of unauthorized operation pursuant to a settlement agreement between SED and 88 Telecom. The facts in that case also showed that one of the co-owners was erroneously informed by another co-owner that the company had obtained Commission authority to operate. The latter co-owner was later divested of his ownership in the company. The above facts are not similar at all to the present case which does not involve a settlement and where NobelTel was fully aware of its unauthorized operation since April 19, 2012.

4.6. Computation of Fine

In view of the various factors discussed above, the Commission finds that NobelTel should be assessed the minimum fine prescribed in § 2107, which is \$500 for each offense, for each day it operated without authority. The period NobelTel operated without authority, however, should be tolled from the time it filed this application until the date of this decision.

Thus, NobelTel should be fined \$500 from April 13, 2012 to January 30, 2013 or \$500 x 293 days. The resulting total amounts to a fine of \$146,500.

5. Conclusion

In reaching this conclusion, the Commission concludes that NobelTel failed to satisfactorily show that it is fit to operate in California and its application should be dismissed without prejudice. The denial of this application means that NobelTel is not authorized to market and sell prepaid calling cards in California.

The Commission considered NobelTel's continued operation without authority since the revocation of its prior authority to operate, the numerous regulatory violations committed in California and in other states, and, issues concerning proper disclosure of rates, terms, and conditions of NobelTel's prepaid calling cards and marketing materials including the NAL issued by the FCC on September 28, 2012, and forfeiture order on October 21, 2015.

For operating without authority, the Commission, in this decision, fines NobelTel \$146,500 for 293 days of operating without authority since April 13, 2012 until January 30, 2013. The period of violation was tolled on January 31, 2015, up to the date of this decision, due to the filing of this application for a CPCN.

NobelTel can file another application for a CPCN pursuant to § 1001 of the Code but must do the following: (a) file a complete application disclosing all information required in D.13-05-035;²² (b) submit audited financial statements for the required period in the application, showing it has the required financial qualifications; (c) demonstrate it has paid the fine of \$146,500 assessed in this decision; (d) determine from the Commission's Communications Division whether it has any unpaid surcharges or other fees and to pay those fees and surcharges; and (e) work with SED to determine and ensure that its prepaid calling cards and marketing materials disclose applicable rates, terms, and conditions for use of its prepaid calling cards.

²² See D.13-05-035 Ordering Paragraphs 14 to 18.

6. Categorization and Need for Hearings

In Resolution ALJ 176-3309, dated February 13, 2013, the Commission preliminarily categorized this application as Ratesetting, and preliminarily determined that hearings were not necessary. On March 7, 2013, SED filed a protest to the application. On May 29, 2013, a prehearing conference was held. Subsequently, on November 18, 2013, an evidentiary hearing was held.

7. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed by NobelTel on February 23, 2016, and reply comments were filed by SED on February 29, 2016.

NobelTel raises the following arguments: (a) that the decision failed to take into account that it hired an outside compliance agency to help it comply with regulatory filings; (b) that the FCC's forfeiture order is not final until NobelTel pays the forfeiture or until it is finally adjudicated; (c) that the decision shifts the burden on NobelTel to show that its marketing practices comply with the Business and Professions Code; (d) that it operated without authority at a de minimis level; and (e) that the Commission generally applies a fine of \$2,000 per year for operating without authority as it did in the case of 88 Telecom.

In its reply comments, SED refutes arguments raised by NobelTel and states that the hiring of a third party consultant does not outweigh NobelTel's history of regulatory violations, that the FCC's forfeiture order is final, that NobelTel has the burden to show that it is fit to operate, and that NobelTel ignored other relevant Commission precedent with respect to the fine imposed.

The Commission finds that NobelTel does not raise any new arguments, and only re-states points it had already raised, which the Commission had already considered in this decision. The recent hiring of a third party consultant to help with regulatory filings does not outweigh NobelTel's history of regulatory violations and, is at best a mitigating circumstance²³ considering that NobelTel continues to operate without authority. With respect to NobelTel's marketing practices, SED is correct in explaining that NobelTel, as the applicant, bears the burden to show that it is fit to operate in California. In addition, questions regarding NobelTel's marketing practices and the FCC's forfeiture order requires NobelTel to show that these are without merit. Also, the FCC's forfeiture order is not an interlocutory order, which is why the only remedy for NobelTel is reconsideration of the order, or appeal. NobelTel also incorrectly argues that the order is not final until it decides to pay the forfeiture as the order is already executory. Finally, the fine generally applied by the Commission for unauthorized operation is the fine prescribed in Sections 2107 and 2108 of the Code. The decision explains why 88 Telecom does not apply to NobelTel's particular situation.

8. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Rafael L. Lirag is the assigned ALJ in this proceeding.

Findings of Fact

1. Notice of the application appeared on the Daily Calendar on February 2, 2013.

²³ The decision considers other mitigating circumstances and based on the circumstances, imposes the minimum fine prescribed in Section 2107 of the Code.

2. In Resolution ALJ 176-3309, dated February 13, 2013; the Commission preliminarily categorized this application as Ratesetting, and preliminarily determined that evidentiary hearings were not necessary.

3. On March 7, 2013, SED filed a protest to the application.

4. An evidentiary hearing was held on November 18, 2013.

5. Public Utilities Code Section 216(a) defines the term “public utility” to include a “telephone corporation.”

6. NobelTel provides wholesale origination and termination services to other carriers and prepaid international telecommunications services to customers, and through an affiliate company, post-paid international dial-around services.

7. Section 1001 of the Public Utilities Code requires telephone corporations to obtain a CPCN from the Commission in order to operate in California

8. NobelTel’s prior CPCN was terminated on April 19, 2012 for failure to pay required surcharges for public purpose programs.

9. NobelTel continued to operate in California after its prior CPCN had been revoked.

10. NobelTel has committed regulatory violations in California and in Illinois, Nebraska, Washington, Florida, Connecticut, Ohio and Wyoming.

11. On September 28, 2012, the FCC issued a NAL against NobelTel alleging that NobelTel’s prepaid calling cards did not sufficiently disclose all rates, terms and conditions applicable to the use of prepaid calling cards.

12. On October 21, 2015, the FCC issued a forfeiture order against NobelTel, imposing a \$5 million penalty for using misleading and deceptive marketing materials to sell its prepaid calling cards in 2011.

13. Under § 2107 of the Public Utilities Code, the penalty for operating without authority ranges from \$500 to \$50,000 for each offense.

14. Under § 2108 of the Public Utilities Code, each day of a continuous violation is considered as a separate offense.

15. In determining the appropriate amount of a fine, the Commission uses the principles established in Decision 98-12-075 wherein the Commission enumerated five factors considered in establishing an appropriate penalty amount.

Conclusions of Law

1. The preliminary determination made in Resolution ALJ 176-3309 of the need for hearings should be changed to hearings are necessary.

2. NobelTel is a telephone corporation and a public utility as defined in Pub. Util. Code §§ 234(a) and 216(a).

3. NobelTel has been operating without Commission authority since the revocation of its prior CPCN on April 19, 2012.

4. NobelTel's operation without Commission authority is in violation of § 1001 of the Public Utilities Code.

5. NobelTel has a history of committing regulatory violations in California and in other states.

6. NobelTel has failed to adequately show that its prepaid telephone cards and marketing materials display correct and accurate information regarding the rates, terms, and conditions applicable to its prepaid telephone cards.

7. NobelTel has failed to satisfactorily demonstrate that it is fit to operate as a telephone corporation in California.

8. In view of the various factors considered in determining the appropriate amount of fine for operating without authority, NobelTel should be assessed the minimum fine prescribed in § 2107, which is \$500 for each offense.

9. For each day that NobelTel operated without authority, NobelTel should be fined \$500.

10. The period NobelTel operated without authority should be tolled from the time it filed this application on January 31, 2013, until the date of this decision.

11. NobelTel should be fined \$146,500, which is equivalent to \$500 each day of 293 days operating without Commission authority, from April 13, 2012, to January 30, 2013.

O R D E R

IT IS ORDERED that:

1. Application 13-01-014, filed by NobelTel, LLC on January 31, 2013, is denied without prejudice to refile at a later date.

2. Within 30 days of the effective date of this order, NobelTel, LLC must pay a fine of \$146,500 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 30 days of the effective date of this order. NobelTel, LLC must write on the face of the check or money order "For deposit to the General Fund per Decision ____."

3. If NobelTel, LLC files a subsequent application for a certificate of public convenience and necessity, it must reference this application and do the following: (a) file a complete application disclosing all information required in Decision 13-05-035; (b) submit audited financial statements for the required period in the application; (c) demonstrate it has paid the fine of \$146,500 assessed in this decision; (d) determine from the Commission's Communications Division whether it has any unpaid surcharges or other required fees and pay those fees;

and (e) work with the Commission's Safety and Enforcement Division to ensure that its prepaid calling cards and marketing materials properly disclose applicable rates, terms, and conditions for use of its prepaid calling cards.

4. The preliminary determination made in Resolution ALJ 176-3309 of the need for hearings is changed to hearings are necessary.

5. Application 13-01-014 is closed.

This order is effective today.

Dated _____, at San Francisco, California.